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BEFORE THE

# Federal Communications Commission

WASHINGTON, D.C. 20554

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Federal Communications Commission
Office of Secretary

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| In the Matter of | ) | |
| | ) | |
| Implementation of Section 621(a)(1) | ) | |
| of the Cable Communications Policy | ) | MB Docket No. 05-311 |
| Act of 1984, as amended by the Cable | ) | |
| Television Consumer Protection and | ) | |
| Competition Act of 1992 | ) | |

## REPLY COMMENTS OF TIME WARNER CABLE INC.

Time Warner Cable Inc. ("TWC"), by its attorneys, respectfully submits the following Reply Comments in the above-captioned proceeding. TWC provides cable service to approximately 11 million subscribers pursuant to more than 2,900 local franchises.

## DISCUSSION

The Commission's proposal to adopt rules relating to the award of additional franchises under Section 621(a)(1) of the Communications Act raises significant legal and policy issues.[1] TWC endorses the initial and reply comments submitted by the National Cable & Telecommunications Association ("NCTA") and provides the following comments to highlight a few specific points. As NCTA points out, the language, structure, and history of Title VI serve as clear prohibitions on the

[1] 47 U.S.C. § 541(a)(1).

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Commission's power to adopt rules that would significantly reduce or eliminate the powers of local governments to regulate additional franchises.[2]

In particular, those commenters (such as Verizon and AT&T) that contend that the Commission has broad authority to adopt rules establishing a different franchising process for new entrants than that applicable to incumbent operators have ignored the fact that Title VI carefully delineates and assigns the roles to be played by various levels and branches of government in awarding cable franchises and overseeing cable system operations.[3] Because Congress has established a detailed framework that divides authority between the federal and local governments with respect to the granting of franchises, it is simply not within the Commission's power to undo that framework as to either new entrants or incumbents.[4] Rather, it is up to Congress to decide whether and how the law should be changed – a route that, we note, the telephone companies are actively and aggressively pursuing.[5]

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[2] *See* Comments of NCTA (filed Feb. 13, 2006); Reply Comments of NCTA (filed Mar. 28, 2006).

[3] *See* Comments of Verizon on Video Franchising (filed Feb. 13, 2006) at 87-88 ("Verizon Comments"); Comments of AT&T Inc. (filed Feb. 13, 2006) at 32-42 ("AT&T Comments").

[4] The fact that local governments have been granted certain responsibilities and powers under Title VI does not mean that they are free to exercise those responsibilities and powers arbitrarily or without oversight. Congress has provided a mechanism in section 635 for judicial review of local attempts to impose unreasonable franchise requirements (whether by means of a denial of an additional franchise, the denial of a renewal, or the denial of a franchise modification request). *See* 47 U.S.C. § 555. In contrast, when Congress intended to give the Commission the role of overseeing the exercise of local authority, as in the case of rate regulation, it clearly knew how to do so. *See* 47 U.S.C. § 543(b)(5).

[5] It also is worth noting that in the 1996 Telecommunications Act, Congress recognized that the entrenched monopoly position of the incumbent local exchange carriers ("ILECs") gave them such inherent advantages in terms of entering the video marketplace as to warrant the expansion of the "effective competition" definition to provide cable operators with immediate regulatory relief when a telco begins providing video. Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56, § 301(b)(3) (1996) (amending § 623(l) of the Communications Act). Over the ensuing decade, the telcos have only gotten stronger, consolidating regional, long distance, and wireless operations, and driving numerous local phone competitors out of business. For example, AT&T's capitalization is greater than that of the entire cable industry.

Moreover, even assuming that the Commission did have the authority to override the regulatory scheme crafted by Congress, the telephone companies' policy arguments as to why such authority should be exercised are baseless. First, the telephone companies argue that the only way that consumers will enjoy the benefits of a competitive multichannel video marketplace, including lower rates, is if there is head-to-head wireline competition in a community.[6] And, they argue, the development of such head-to-head competition is being frustrated by entry barriers erected by the local franchising process.[7] Both of these propositions are wrong.

First, as the Commission itself has clearly recognized, there already is substantial competition in the video marketplace. The Commission's recently issued annual competition report expressly acknowledged that "almost all consumers have the choice between over-the-air broadcast television, a cable service, and at least two DBS providers" and that emerging technologies, such as digital broadcast spectrum and video over the Internet are beginning to provide consumers with additional avenues of access to video programming.[8]

Despite the indisputable evidence that the video marketplace is characterized by robust competition among and between multiple providers, the telephone companies point to reports prepared by the Government Accountability Office ("GAO") that they characterize as finding that wireline competition holds down cable rates more than DBS

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[6] *See, e.g.*, Comments of QWEST International Inc. (filed Feb. 13, 2006) at 4-5 ("QWEST Comments"); Verizon Comments at 4-5; Comments of the United States Telecom Association (filed Feb. 13, 2006) at 18-19; Comments of BellSouth Corporation and BellSouth Entertainment, LLC (filed Feb. 13, 2006) at 3-4 ("BellSouth Comments").

[7] *See, e.g.*, QWEST Comments at 2, 6-7; Verizon Comments at 5-8; AT&T Comments at 23-28.

[8] *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming,* Twelfth Annual Report, FCC 06-11, ¶ 5 (rel. March 3, 2006).

competition.[9] But the GAO itself has cautioned that, because of its small sample size, its analysis is not "generalizable to the universe of cable systems" and has found, to the contrary, that cable operators are responding to DBS competition by "providing bundles of services to subscribers, and lowering prices and providing discounts."[10]

Thus, to the extent that some commenters have suggested that spurring price competition would provide a rationale for the Commission to engage in one-sided intervention in the local franchising process (assuming the Commission had such authority), they are guilty of ignoring the realities of today's marketplace. Indeed, independent analyses establish that cable operators currently contend for subscribers in a highly competitive environment in which the "list price" shown on an operator's rate card has become largely irrelevant both because of the pervasive use of promotional rates and because of the establishment of discounted "package" prices for bundles of services.[11] By focusing only on "retail" rate card prices that are not reflective of the prices that

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[9] *See, e.g.*, GAO, Report to the Chairman, Comm. on Commerce, Science, and Transportation, U.S. Senate, *Telecommunications: Issues Related to Competition and Subscriber Rates in the Cable Television Industry*, GAO-04-8, p. 9-11 (Oct. 2003); GAO, Report to the Subcomm. on Antitrust, Competition Policy, and Consumer Rights, Comm. on the Judiciary, U.S. Senate, *Telecommunications: Wire-Based Competition Benefited Consumers in Selected Markets*, GAO-04-241, p. 12-15 (Feb. 2004) (*"2004 GAO Report"*).

[10] GAO, Testimony Before the Comm. on Commerce, Science and Transportation, U.S. Senate, *Telecommunications: Subscriber Rates and Competition in the Cable Television Industry,* GAO 04-262T, p. 7 (March 25, 2004); *2004 GAO Report* at 29-30. The GAO expressly noted that the cable operators it interviewed stated that their most important competitors were the two national DBS companies. *Id.* at 30. *See also* Reply Comments of NCTA, MB Docket No. 05-255, (filed Oct. 11, 2005) at 6-9; Reply Comments of Time Warner Cable Inc., MB Docket No. 05-255, (filed Oct. 11, 2005) at 1-4; Reply Comments of NCTA, MB Docket No. 04-227, (filed Aug. 25, 2004) at 6-10.

[11] For example, SG Cowen and other analysts regularly publish reports that track the actual vigorous price competition among telephone companies, cable operators, and DBS providers for high-speed data, video and voice products. One recent Cowen report notes that the major cable operators are offering promotional and standard bundling discounts for customers who take multiple products, and that cable operators' bundled prices are often from 10 to more than 30 percent lower than the price to purchase the bundled products separately. *See* SG Cowen & Co., "Cable Pricing Survey – February 2006," Mar. 23, 2006.

subscribers actually pay for service, these commenters have grossly understated the effect that competition, particularly DBS competition, already is having on cable rates.[12]

Second, there also is no merit to the claim that the local franchising process is creating any barrier to additional video competition. Among other things, this is evidenced by the comments of dozens of local franchising authorities describing the process by which they speedily considered and granted additional franchises to wireline providers such as RCN, Wide Open West, Everest, etc.[13] Even more importantly, literally hundreds of additional franchising authorities have filed comments attesting that they stand ready to promptly award cable franchises to new entrants.[14]

TWC notes that its experience, and the experiences of the local governments from whom TWC has obtained franchises, offer further proof that the franchising process is

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[12] Indeed, a staff research paper prepared jointly by two economists from the Commission's Media and International Bureaus concluded that the results of econometric research into DBS-cable competition were "consistent with the hypothesis that DBS providers are a constraining factor on quality-adjusted price increases for basic cable services." Wise and Duwadi, *Competition Between Cable Television and Direct Broadcast Satellite – It's More Complicated Than You Think,* Federal Communications Commission, Media Bureau Staff Research Paper No. 2005-1/International Bureau Working Paper No. 3, p. 20 (Jan. 2005), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-255869A1.pdf.

[13] The comments indicate that applications for an additional franchise typically are granted in around 90 days, far less time than Congress has allocated for the consideration of franchise renewals. *See, e.g.*, Comments of the City of San Diego, California (filed Feb. 13, 2006) at 3 (negotiating a franchise with both RCN and Western Integrated Networks within a few months) ("San Diego Comments"); Comments of City of Kansas City, Missouri (filed Feb. 13, 2006) at 7 (completing the franchising process for two overbuilders, Everest Connections and WideOpen West, within two months and two weeks, respectively); Comments of Davidson County, North Carolina (filed Feb. 8, 2006) at 4 (completing franchise negotiations with LEXCOM within ninety days) ("Davidson County Comments"); Comments of Rockingham County, North Carolina (filed Jan. 17, 2006) at 4 ("Rockingham County Comments") (completing negotiations with Carolina Cable Partners within 90 days); Comments of the City of Lexington, North Carolina (filed Feb. 14, 2006) at 4 ("Lexington Comments") (completing negotiations with LEXCOM within 90 days); Comments of the County of San Diego, California (filed Feb. 7, 2006) at 4 (excluding a delay in negotiations requested by the applicant, the entire franchise process took about ninety days).

[14] *See, e.g.*, Comments of Miami Valley Communications Council (filed Feb. 6, 2006) at 7 ("MVCC Comments"); Comments of the City of Cincinnati, Ohio (filed Feb. 13, 2006) at 3 ("Cincinnati Comments"); Comments of the City of Coronado, California (filed Feb. 8, 2006) at 3; Comments of the City of Del Mar, California (filed Jan. 27, 2006) at 4-7; Comments of the Town of Madison, North Carolina (filed Jan. 30, 2006) at 4.

not a barrier to competition. Several dozen communities in which TWC currently provides franchised cable service are among the hundreds of local governments that have submitted comments in this proceeding.[15] The comments submitted by these communities typically express satisfaction with their current level of service, describing TWC as "a great community partner."[16] Nonetheless, they also make clear that they would welcome applications for additional franchises and in some instances have actively sought out such competition only to be rebuffed by the telcos.[17]

Real-world experience under legislation adopted in Texas last year provides compelling evidence that any allegation by the ILECs that they are being stymied by the franchising process is nothing more than a red herring. That legislation, which was pushed by the ILECs, largely eliminates all local franchise requirements for new entrants and provides for the rapid issuance of state-granted franchises in any communities where the new entrant wishes to offer service.[18] Both in terms of procedure and substance, this

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[15] *See, e.g.*, MVCC Comments; Cincinnati Comments; San Diego Comments; Comments of the City of Lincoln, Nebraska (filed Feb. 13, 2006) ("Lincoln Comments"); Comments of the City of South Portland, Maine (filed Feb. 13, 2006) ("South Portland Comments"); Comments of the County of Darlington, South Carolina (filed Feb. 6, 2006).

[16] *See, e.g.*, Davidson County Comments at 2; Rockingham County Comments at 2; Lexington Comments at 4; Comments of Town of Kernersville, North Carolina (filed Feb. 21, 2006) at 2.

[17] *See, e.g.*, Lincoln Comments at 3; Texas Coalition of Cities For Utility Issues' ("TCCFUI") Comments on Cable Franchising NPRM (filed Feb. 6, 2006) at 6 ("TCCFUI Comments"); Comments of Orange County, North Carolina (filed Feb. 10, 2006) at 4; Comments of City of Concord, North Carolina (filed Feb. 8, 2006) at 3; Comments of City of Appleton, Wisconsin (filed Feb. 13, 2006) at 1; MVCC Comments at 7; South Portland Comments at 5; Comments of City of Susanville, California (filed Feb. 6, 2006) at 1; Comments of the City of Durham, North Carolina (filed Feb. 13, 2006) at 3; Comments of the Town of Esopus, New York (filed Feb. 13, 2006) at 4.

[18] Under the Texas law, a new entrant can obtain authorization to begin providing video service merely by filing a pro forma application with the Texas Public Utilities Commission ("TPUC"). *See* Tex. Util. Code § 66.003(b). The TPUC is required to process the application and issue a franchise within 17 business days. *Id.*

state-issued franchise eliminates virtually all of the elements of the traditional franchise process that the telcos claim have been impeding their entry into the video marketplace.[19]

If, as the ILECs claim, what is holding them back from entering the video marketplace is the local franchising process, one would have expected the enactment of the Texas legislation to have triggered a flood of filings from telcos seeking to provide new video service in the state and the actual launch of new services. However, even though the Texas legislation became effective nearly seven months ago, the ILECs still are largely standing on the sidelines. SBC (now AT&T), for example, has submitted exactly one application covering only 21 municipalities in and around its corporate headquarters in San Antonio – and it is Time Warner's understanding that service has yet to be activated in any of these areas.[20] Verizon's response to the new law has been similarly limited.[21] Indeed, it has been reported that cable operators, who are permitted to obtain these new state-issued franchises only upon the expiration of existing local franchises, have taken advantage of the new law far more frequently and extensively than the ILECs who claim to be clamoring to provide service.[22] Thus, despite their

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[19] Incumbent cable operators generally are not eligible to apply for a state-issued franchise under the Texas law until such time as their existing franchises expire. *Id.* at § 66.004(a).

[20] *See* Texas Public Utilities Commission, "State-issued Certificate of Franchise Authority Directory," http://www.puc.state.tx.us/cable/directories/CFA/CFA_Directory.htm (last visited: Mar. 27, 2006).

[21] *See id.* Verizon's much ballyhooed launch of video service in Keller, Texas was accomplished pursuant to a traditional local franchise, further undermining the ILECs' claim that the process prevents them from offering video services. Mike Reynolds, *Texas City Oks Verizon Cable Franchise*, Multichannel News, Feb. 2, 2005, *available at* http://www.multichannel.com/article/CA501120.html?display=Search+Results&text=keller.

[22] *See* Herb Kirchoff, *Most Tex. Statewide Video Franchises Go to Cable, Not Telcos*, Communications Daily, Mar. 27, 2006 at 1-2. For all of the telcos' talk about their entry into video being beneficial to consumers, it also is worth noting that AT&T recently announced that, pursuant to a state law that ended local phone rate regulation where there is competition for voice service, it is raising its basic phone rates for around one-third of its Texas customers. Kirk Ladendorf, *AT&T Raising Basic Phone Rates in May*, AUSTIN AMERICAN-STATESMAN, Mar. 11, 2006, *available at* http://www.statesman.com/search/content/business/stories/other/03/11phonerate.html.

protestations to the contrary, it is not the franchising process that is constraining the telcos from more quickly entering the video business.[23]

## CONCLUSION

The comments in this proceeding reveal that the Commission has neither the legal authority nor a valid policy justification to adopt rules that would radically redefine the local franchising process.

Respectfully submitted,

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[23] Bell South and the TCCFUI both claim that TWC has sought to "frustrate" the grant of additional franchises. Bell South Comments at 16-17; TCCFUI Comments at 7-8,13. However, the facts do not in any way support this characterization of TWC actions. Each of the situations described involved a franchising authority with whom TWC already had entered into an agreement. In each instance, the local franchising authority was willing and ready to grant one or more additional franchises and TWC made no effort to block or prevent those grants from being made. All that TWC did was express its position that fair competition requires that all providers of cable service be subject to comparable franchise terms and conditions. BellSouth Comments at 16-17; TCCFUI Comments at 16, 18. To the extent that the franchise process did not result in the provision of service by an additional franchisee in certain of the cited situations, responsibility for the outcome rests not with the local franchising authority or TWC, but with the potential competitors who chose either to abandon franchises after they were granted or to withdraw their applications before the process was complete. *Id.*